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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1943

No. 21

UNITED STATES OF AMERICA, Ex Rel. MURRAY BRENSILBER, and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER on Their Own Behalf,

Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR THE PETITIONERS.

Respondents, in their brief, seek to avoid the issue of law presented by this case on the theory that the judgment under review was a judgment rendered upon affidavits pursuant to Rule 56, that the affidavits of petitioners do not controvert the affidavits of respondents in any material

respect, and that therefore the judgment below is to be sustained solely because there was no issue whatever before the trial court upon which trial should be had. On that ground, respondents take the position that it is "unnecessary to consider" the leading authorities presented in support of the petition (Resp. Br. p. 29). This reply is limited solely to the question whether the judgments below were rendered upon affidavits pursuant to Rule 56 and whether they could properly be so rendered.[1]

1. The Judgments Below Were Not Rendered For Lack of Any Issue of Fact Appearing Upon the Affidavits But Upon the Face of the Allegations of the Complaint Alone, and Therefore the Question Here Is So Limited.

The record clearly demonstrates that respondents here sought and secured a judgment upon the pleadings. Rule 12 provides for dismissal of a complaint on motion for "failure to state a claim upon which relief can be granted." Such relief was sought by the original order to show cause

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[1]The brief for Carl Zeiss, Inc., takes the position that no cause of action is stated against it because Zeiss never did business with the United States Government; but the simple answer is that Zeiss, as one of the co-conspirators, is answerable for the acts of Bausch & Lomb and of Zeiss of Jena. For authorities upon this familiar rule of law, see petitioners' main brief, p. 31.

Carl Zeiss, Inc., also takes the position that an action under the statute here involved cannot be maintained against a corporation since the statute refers only to "persons". The short answer is that Section 1 of both the Revised Statutes and the United States Code provides that "the word 'person' may extend and be applied to * * * corporations."

This reply brief will treat primarily with the position of the Bausch & Lomb respondents, since Zeiss, as a co-conspirator, is liable if Bausch & Lomb is liable.

(R. 12), the attached affidavit of counsel (R. 13-14), the attached affidavit of the president of Bausch & Lomb (R. 17-18, 22), the notice of motion (R. 39-40), the affidavit of the president of Zeiss (R. 41), the second and amended order to show cause upon which the trial court's judgment was entered (R. 46-47), and the second affidavit of counsel (R. 49, 51). Counsel for both Bausch & Lomb and Zeiss, Inc., specifically referred to Rule 12 (R. 14, 39).

The original order to show cause asked that the original complaint be dismissed, in the language of Rule 12, "on the ground that the complaint fails to state a claim" (R. 12). Grounds 2 (a) and (b) of the second order to show cause, obtained by Bausch & Lomb and upon which the judgment of the trial court was entered, asked that the court determine that the "amended complaint * * * is a nullity" and also deny leave to file it (R. 46-47); and the similar order obtained by Zeiss made the same requests (R. 58-59). Indeed, summary judgment procedure was sought by Bausch & Lomb, as set forth in the affidavit of counsel, "in the alternative, but only in the event that grounds 2 (a) and (b) of this motion are denied" (R. 52).

The trial court thereupon held that "the proposed amended *complaint* of the plaintiffs herein is a nullity," denied leave to amend the complaint "on the ground that the * * * proposed amended *complaint* does not state a cause of action" (R. 258), entered its order "that the *complaint* herein be and it hereby is dismissed," and accordingly entered judgment with costs (R. 261). The Circuit Court of Appeals so treated the judgment, stating that the trial judge "did indeed deny leave to amend on the ground that the second *complaint* did not state a cause of action" (R. 269) and addressed its opinion to the issue of law as to whether affirmative representations are necessary to constitute fraud under the statute. The emphasis supplied in the foregoing quotations indicates clearly that both courts were addressing their remarks to the "com-

plaint" and not to affidavits. Anyone familiar with summary judgment procedure under Rule 56 and the decisions thereon may see at a glance that these decisions were not rendered upon a comparison of opposing affidavits and a finding that no relevant issue of fact remained.

It is true that, in addition to its order denying leave to file the amended complaint, the trial court also entered "summary judgment" (R. 261); and the Circuit Court of Appeals found the instant action "precisely the sort which a motion for summary judgment was intended to nip in the bud" (R. 269). But these references to "summary judgment" do not mean that the judgment was entered upon the affidavits, for "summary judgment" is a phrase of many meanings and includes judgment entered upon the pleadings alone. Rule 56 itself specifically authorizes summary judgment "if the pleadings * * * show * * * that the moving party is entitled to a judgment as a matter of law." Hence, summary judgments are granted for insufficiency of the complaint or answer. Where the issue is "clearly and exclusively one of law" showing insufficiency of the claim, "the pleadings not only permitted but required that judgment be entered upon them without further proceedings." *Farley* v. *Abbetmeier*, 114 F. 2d 569, 574 (U. S. App. D. C., 1940). Summary judgment will be entered where the answer does not state a defense. *Person* v. *United States*, 112 F. 2d 1 (C. C. A. 8, 1940). "Where a defendant thinks he is entitled under the Federal Rules of Civil Procedure to a judgment *either* on the pleadings *or* on the basis of extrinsic facts established by affidavits, depositions or stipulations, he may at any time move with or without supporting affidavits for a summary judgment in his favor." *Johnson* v. *Johnson & Co., Inc.*, 6 Fed. Rules Serv. 12e.22, Case 1 (N. D. Ga., 1942), emphasis supplied.

Manifestly, both courts below used the phrase "summary judgment" with reference to judgment on the pleadings. Accordingly, respondents' attempt now to argue

their right to relief upon the affidavits under Rule 56 is in effect a request that this Court both (1) do what the courts below declined to do and (2) undertake to determine issues not passed upon below.

2. Summary Judgment Could Not Properly Be Entered For Respondents Upon the Affidavits Filed Herein.

Where the right to such judgment is determined upon affidavits, summary judgment is properly entered only if, in the words of Rule 56, the affidavits "show that * * * there is no genuine issue as to any material fact." Throughout their brief respondents speak of "evidence", as though summary judgment were a trial by affidavit. But Rule 56 "does not compel a party to try his case on affidavits." *United States* v. *Newbury Mfg. Co.*, 4 Fed. Rules Serv. 56c.41, Case 15 (Mass., 1941); *Chemical Foundation Inc.* v. *Universal-Cyclops Steel Corp.*, 5 Fed. Rules Serv. 56c.41, Case 7 (W. D. Pa., 1942). On motion for summary judgment "the court is not authorized to decide an issue of fact, but is to determine whether the pleadings and record before the court creates an issue of fact to be tried." *Ramsouer* v. *Midland Valley R. Co.*, 44 F. Supp. 523, 526 (W. D. Ark., 1942). "The court in such proceedings is not permitted to try on the affidavits submitted an issue of fact which is presented by the pleadings." *Campana Corporation* v. *Harrison*, 135 F. 2d 334, 335-336 (C. C. A. 7, 1943). And the rule obtains even where the entire record in a previous trial is presented on the motion. *Ramsouer* v. *Midland Valley R. Co.*, 135 F. 2d 101, 103 (C. C. A. 8, 1943).

Aside from the general issue of law, discussed by the court below and treated in petitioners' main brief, the only issue there could be here is whether respondents by their affidavits have, in the language of Rule 56, demonstrated that "there is no genuine issue as to any material fact." Respondents have filed no answers, a state of the record upon which some courts refuse to examine affidavits.

Nickelson v. *Nestles Milk Products Corporation*, 107 F. 2d 17, 19 (C. C. A. 5, 1939); *Hooven etc. Co.* v. *Royal Indemnity Co.*, 4 Fed. Rules Serv. 56a.3, Case 1. (S. D. Ohio, 1940); *Johnson-Crews Co.* v. *United States*, 38 F. Supp. 544 (E. D. S. C., 1941). The burden is on the movant of showing that there is no issue as to any material fact. *Standard Rolling Mills, Inc.* v. *National Mineral Co.*, 5 Fed. Rules Serv. 56c.41, Case 5 (E. D. N. Y., 1942); *Ramsouer* v. *Midland Valley R. Co.*, 44 F. Supp. 523, 527 (W. D. Ark., 1942). "All doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment." *Tobelman* v. *Missouri-Kansas Pipe Line Co.*, 130 F. 2d 1016, 1018 (C. C. A. 3, 1942). "The court should take that view of the evidence most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Ramsouer* v. *Midland Valley R. Co.*, 135 F. 2d 101, 106 (C. C. A. 8, 1943).

The affidavits upon which respondents here rely were addressed to the original complaint and not to the amended complaint, counsel for both Bausch & Lomb and Zeiss, Inc., merely filing further affidavits asking that the amended complaint be considered upon their original motions (R. 49, 60). Moreover, the only affidavit which purports to state material facts is that of the president of Bausch & Lomb (R. 17-31), to which other affidavits for respondents merely refer (R. 32, 33); and it is to be noted that this affiant is the person who executed the original collusive agreement involved herein (R. 120).

For the following several reasons, no court could properly render summary judgment on the record here:

(1)

Respondents were attempting to secure a summary judgment by judicial notice of the records in the prior govern-

ment proceedings[2]—as appears by the introductory statement in the affidavit of the president of Bausch & Lomb that the complaint is "in direct contradiction of facts which this Court may notice in the files of the Court" (R. 22-23), by the similar affidavit of the president of Zeiss to the effect that "practically all" of the allegations of the complaint "are directly contrary to facts which this Court may take cognizance of as they are in the files of this court" (R. 41), and by the statements of both presidents in their affidavits that the records in the government proceedings could be deemed incorporated in their affidavits (R. 24, 26, 42, 44). Since respondents have thus chosen to rely upon the records in the government proceedings, they are in no position to complain because the petitioners thereafter did likewise (R. 65, 86, 112, 194, 145, 151, 153, 157, 212, 243) and they are in no position to maintain as they do that such incorporation by reference is improper under Rule 56 (Resp. Br., pp. 19 *et seq.*). Moreover, by their wholesale reference to those records they make it doubly proper for petitioners to show, as it is done throughout petitioners' main brief, that the records in the government cases support and confirm the fraud pleaded in the complaint.

(2)

Secondly, the affidavit of Eisenhart, president of Bausch & Lomb, does not set forth facts but is composed, in addition to the references to the prior government proceedings, only of arguments of law and of general or equivocal denials as set forth on pages 18 to 21 of peti-

[2]Summary judgment may, of course, be entered upon judicial notice of facts precluding recovery. *Fletcher* v. *Evening Star*, 114 F. 2d 582, cert. denied 312 U. S. 694; and 133 F. 2d 395 (U. S. App. D. C., 1942).

tioners' main brief. He states that the earlier agreements were "in terms revoked" (R. 27), which is in contradiction of the facts appearing in the government bill of particulars (Pet. Br., pp. 4-8, 32-33), and is immaterial in any event because the formal revocation of the agreements falls far short of cessation of the fraudulent practice charged. He asserts Bausch & Lomb "alone" fixed the prices of military optical instruments sold to the United States government (R. 27-28), which is of course no denial that Bausch & Lomb had placed itself in a position to fix and maintain arbitrary, artificial, and unreasonably high prices by its elimination of Zeiss of Jena from the field. He denies that "the 20% bid provision of the 1925 agreement" was ever invoked (R. 29), which does not deny that such an arrangement was later used as charged or that Zeiss made the "protective offers" charged, and which is contradicted by the facts appearing in the government's bill of particulars (Pet. Br., p. 33, note 8). Finally, he "categorically" denies that respondents "presented for payment * * * bills * * * and accounts against the United States knowing that such documents were excessive, false, fictitious and fraudulent" (R. 29-30), which is not a denial that bills and accounts were presented but is merely a denial that they were "fraudulent" and is hence no statement of fact but merely a disavowal of the ultimate conclusion of law to be established upon a trial of the case. No other relevant facts are stated by Eisenhart or any other respondent, or by anyone on behalf of the respondents.

The affidavits for respondents, therefore, do not in themselves raise any material issue of fact for petitioners to controvert and, consequently, present no ground for summary judgment upon affidavits. The responsive affidavits for petitioners, therefore, quite properly replied in kind. Aside from the arguments of law in reply to the

arguments of law in respondents' affidavits,[3] petitioners' affidavits enumerate the changes made by the amended complaint (R. 72-73) and, as the respondents had previously done, refer to the records in the previous government cases (R. 64-65, and see note 2 at page 9 of petitioners' main brief).

Upon this state of the record, and upon these opposing affidavits, the courts below were in no position to do more than pass upon the sufficiency of the allegations appearing upon the face of the complaint, which they did.

(3)

Moreover, petitioners ~~respondents~~ were not accorded a fair opportunity to present their case by affidavits. The order to show cause, upon which the judgment here involved was entered, was served on January 14 and returnable two days later, on January 16, 1942. Rule 56 (c), however, specifically provides that "the motion shall be served at least 10 days before the time specified for the hearing." Petitioners duly objected (R. 67) without avail, so that the hearing was held in direct violation of both the rule quoted above respecting summary judgments and Rule 6 (d) as to motions generally. In addition, the order to show cause "stayed" plaintiffs "from taking any further proceedings in this action" (R. 48) and thus precluded them from the exercise of their rights to pre-trial examination, discovery, and inspection under the Rules of Civil Procedure to which they directed the attention of the trial court (R. 67). It

[3]These arguments were addressed to respondents' assertion that petitioners were subject to disciplinary action under Rule 11 for irresponsible statements (R. 65), to showing their right to file the amended complaint (R. 66), to petitioners' right to ten days' notice prior to summary judgment hearing (R. 67-68), to respondent Zeiss' contention that it was not a party to the fraud (R. 68-72, 74), and to the contention that the government had disavowed the existence of fraud (R. 73-74).

may indeed be conceded that the proceeding was "summary," but at the same time it was in direct violation of the mandatory requirements of the Rules of Civil Procedure and hence unlawful. Particularly since fraud was an issue and cross-examination desirable, the court should at least have deferred action so that the complaining party might take depositions. *Shultz* v. *Manufacturers & Traders Trust Co.*, 32 F. Supp. 120, 121 (W. D. N. Y., 1940).

(4)

Finally, it may be noted that this is not the kind of case for which summary judgment procedure is designed. Dean Charles E. Clark (who, as respondents state at page 15 of their brief, "sat below and acted as Reporter for the Revisers of the Federal Rules") stated at the Cleveland Institute on the new rules that

> The great question about the motion for summary judgment is whether it may not be attempted in all sorts of cases, whereas it is only really going to perform its function in the simple case where there isn't much of a defense. (Proceedings, American Bar Association Institute, Cleveland, 1938, p. 225.)

This, of course, is no "simple case". The international scope and subtle operation of the fraud here pleaded do not lend themselves to affidavit procedure, which is perhaps the reason why respondents themselves filed affidavits which were either general denials or argumentative. That almost any cause of action for fraud once stated in a pleading is not thereafter susceptible to summary judgment on affidavits has been the experience of several courts. "Summary judgment * * * was not intended to function" in a case based on "a complex and intricate scheme of fraud" because such cases "are entirely too involved to be disposed of in such a summary manner." *Shultz* v. *Manufacturers & Traders Trust Co.*, 3 Fed. Rules Serv. 56c.41, Case 11 (W. D. N. Y., 1940). An issue of "false representations * * * can only be determined by the testimony of

witnesses upon final hearing." *Merchants Distilling Corp.* v. *American B. Corp.*, 33 F. Supp. 304, 306 (Del., 1940). Here the essential finding of fraud is for the jury, and hence summary judgment on affidavits should not be permitted "unless it is quite clear what the truth is." *Port of Palm Beach Dist.* v. *Goethals*, 104 F. 2d 706, 709 (C. C. A. 5, 1939); and see *Affiliated Enterprises* v. *Courter Amusement Co.*, 32 F. Supp. 11, 13 (E. D. N. Y., 1940). Where the issue is not only one for a jury but involves the credibility of witnesses, the case is doubly one for trial rather than summary judgment. *Whitaker* v. *Coleman*, 115 F. 2d 305 (C. C. A. 5, 1940). Only where the ultimate conclusions in dispute are for a court rather than a jury may the court grant summary judgment. *Fox* v. *Johnson & Wimsatt, Inc.*, 127 F. 2d 729, 737 (U. S. App. D. C., 1942). Where the dispute is as to what agreement, partly oral, there was between the parties, summary judgment is improper. *Irving Trust Co.* v. *McKeever*, 5 Fed. Rules Serv. 56c.41, Case 2 (E. D. N. Y.).

Conclusion.

It is respectfully submitted that (1) fraud under the statute here involved is sufficiently alleged on the face of the amended complaint; (2) both courts below treated the case as one arising solely upon the face of the complaint pursuant to Rule 12 and, in their conclusions thereon, erroneously found no fraud stated; and (3) even treating the proceeding now as one upon affidavits filed pursuant to Rule 56, respondents have not demonstrated the required lack of any issue of fact and the issues in the case are not of the type adaptable to affidavit procedure.

HOMER CUMMINGS,
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Counsel for Petitioners.

October, 1943.